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IS "INCOME," RECEIVED FROM A LICENSED BUSINESS OR PROFESSION AND NOT FROM PROPERTY OR SALARIES, TAXABLE?

Let it be observed at the outset that the question is not one of power but one of legislative intent; not whether the legislature *can,* but whether it *has* put both a license and an income tax on the same subject in the hands of the same person, and thereby imposed a double burden on certain citizens.

The question is answered when we have ascertained the intention of the legislation bearing on the subject in accordance with established rules of statutory construction, and it is believed that it is perfectly clear from the various provisions of the "Tax Bill" published as an "Appendix" to the Code of 1904, that such was not the intention of the legislature, and that the "incomes" of lawyers, physicians, and other persons required to pay a specific license tax, derived from the licensed profession or business, are not taxable. In order to answer this question intelligently it is necessary to examine this "Tax Bill" as a whole, and with special reference to its classification of the various subjects of taxation. Therefore we call attention:

1. TO THE CLASSIFICATION OF SUBJECTS.

The very first section of the statute divides and classifies all subjects of taxation into four classes, viz, "persons," "property," "incomes" and "licenses." "Property" is then again classified and § 2 covers real property and is made to embrace land, lots, improvements, *ground rents and rent charge* (we emphasize these rents for future reference).

Then in § 3 comes a "Classification of Persons and Personal Property," by schedules, and Schedule A covers persons and poll taxes. Then comes Schedule B, covering all "Tangible Personal Property" in § 6, and § 7 fixes the tax to be levied on all of this class. Then follows Schedule C, covering personal property in

"choses in action, etc.," covering bonds, notes and all other evidences of debt, "second" "capital" in various concerns, etc., etc.

We then get to Schedule D, in § 10, which covers the "aggregate amount of income in excess of $600" (now "in excess of $2,000," under recent amendment). Then follows what *"Income Shall Include,"* which is the subject of this note.

Then follows the tax on wills, deeds, suits, seals, banks, insurance, railway, express, sleeping-car, telegraph and telephone companies, charters, franchises and inheritances, and on page 2220 we get to the final subject of taxation in "Licences."

The thing most clearly manifest from a careful reading of this whole statute is the obvious intent that the classifications shall not duplicate each other; that the subjects of one classification shall not be again subjected to a second levy in any other classification, and thereby cause that subject to bear a double burden.

For instance, in § 2, we find that "ground rents and rent charge" is classified and taxed as real property; and when we get to Schedule D, under what "Income shall include," we find that it is made-to include "All rents, *except ground rents or rent charge,"* which rents were excepted manifestly because covered by § 2.

Again: Section 8, embracing "choses in action," covers the principal sum secured by the various evidences of debt, and the principal sum invested as "capital" and actively used in business, etc., and the only exception to this is in the "Fifth" paragraph where the sum is "under control of a court," in which case both "principal and *interest*" is to be taxed; but when we come to the Income Schedule, we find that of "choses in action" only the *"interest"* on bonds, notes and other evidences of debt, "collected or received during the year" is embraced, omitting such "interest" as is "under control of a court." In other words, it manifestly appears from the whole act that the legislature intended to separate the subjects of taxation generically by classifications which should embrace only those of *like kind.*

2. What "Income Shall Include."

The statute here first sets out in express terms four specific sources of income which are subjected to the tax, and they are as follows:

"First," all rents (excepting such as are taxed by § 2), salaries, and *interest* on all choses in action.

"Second," premiums on gold, silver or coupons.

"Third," sales from live stock and meat, *less value assessed under Schedule B as "tangible" personal property.*

"Fourth," sales of wood, butter, cheese, hay, tobacco, grain, and all other " vegetable and agricultural" productions, less cost of production, including all taxes and rent (if any), paid for land.

"Fifth," *all other gains and profits, derived from any source* WHATEVER.

A careful analysis of the *enumerated* sources from "first" to "fourth" inclusive shows confessedly that (with the exception of "salaries"), the legislature was here dealing with incomes from *property,* either real or personal, and that, except in the case of "interest," the source in every instance is "tangible" property. It is also true that the *corpus* of this property is classified and taxed in preceding schedules; it is also true that "salaries," the only income not springing directly from ownership of property, *are not elsewhere taxed.* It is also true that neither of the first four sources of income expressly or by necessary implication covers any business or profession which is taxed by a specific or graduated license tax; and, therefore, if any such business or profession is embraced by this section at all, it must be by the "Fifth" paragraph, which is general and made to cover "All *other* gains and profits derived from *any source whatever.*"

If we were to strike out of this section the first, second, third and fourth paragraphs, and the word *"other"* from the "fifth," so that it would read: "Income shall include all gains and profits derived from any source whatever," no income would escape, and the intention to make the lawyer pay a specific license tax, and, in addition, an income tax of one per cent on receipts over $2,000, would be very clear, and the question (if any) would then be one of power to impose such double burdens.

Before undertaking to fix the scope of this broad general paragraph, covering "any souce whatever," it is well to note the fact that similar general provisions occur in other schedules of this statute. For instance, in Schedule B, covering "tangible" personal property, there are twenty paragraphs naming specifically every conceivable sort of "tangible" personal property; then follows the

general "drag-net" provision in the twenty-first clause covering *"all other* tangible personal property not specifically enumerated in this or other schedules." Again, in Schedule C, covering "choses in action," after naming bonds, notes and other evidences of debt, it proceeds to cover "all demands and claims, however evidenced" and whether "secured" or "unsecured." It is equally well known that statutes without number, dealing with other subjects than taxation, after dealing specifically with their subjects, proceed in a broad general provision to gather within its purpose and operation all those cases of *like character and nature* coming within the *class* specifically dealt with, but which may not have been embraced within the specific terms of the preceding words.

Had the "twenty-first" clause been omitted from Schedule B, or the "fifth" clause from Schedule D, then the maxim *enumeratio unius est exclusio alterius*—specification of one thing is the exclusion of the other—would have applied, and taxes could only have been assessed upon the specific tangible personal property mentioned in clauses 1 to 20 inclusive, while all incomes not derived from the specific sources mentioned in clauses 1 to 4 inclusive would have escaped, although there undoubtedly is other tangible property and other sources of income which would fall within the same *class* as that specifically mentioned. Hence the reason for "drag-net" provisions in such statutes.

This brings us to the doctrine "ejustem generis," the application of which we think makes it conclusive that the "fifth" clause of the section in question, covering "all other" incomes derived from "any source whatever," must be held to mean any source similar to those specifically mentioned in the four preceding paragraphs. "When there are general words following particular and specific words, the former must be confined to things of the same kind. This is known as the rule or doctrine of *ejusdem generis." 2 Sutherland's Statutory Construction, 2nd Ed., § 422, et seq.* This rule is regarded as elementary and needs no extended citations to support it.

Therefore we hold that, since the *specific enumeration* of sources of income does not include any licensed profession or business, and is confined to income derived from *property* and *salaries,* the general provision covering "any source whatever" must be limited to the same *kind* of sources previously specifically named,

that is, to incomes from property (real, personal or mixed), and salaries. Lynchburg *v.* N. & W. Ry. Co., 80 Va. 237, 248, is a very strong authority for above construction.

3. PRESUMPTION IS AGAINST ALL TAXES NOT EXPRESSLY IMPOSED.

Not only did the maxim that the "specification of one thing is the exclusion of the other" account for the presence of the general words and make them necessary without imputing any intent that they should cover any subject not generically embraced in the specific enumeration in the four preceding clauses, and the maxim *ejusdem generis* limit the general words as before stated; but the above stated presumption is just as well settled as to all tax statutes as either of the maxims are as to all statutes generally.

The presumption is always in favor of the citizen and therefore no tax can be imposed save by the clearest and most unmistakable words.

This principle is established by all the authorities and is so elementary that it needs no citations, but we cite the case of Plumer *v.* Commonwealth, 3 Gratt. 645, because it involves a similar statute and seems conclusive upon the indentical question in hand. The question in that case was whether a minister's salary was within the income tax statute of 1846. The statute was as follows:

"There shall be levied . . . . on all yearly income, in money . . . . over and above the sum of $400, in consideration of the discharge of any office, or employment in the service of this Commonwealth, or in the service of any body politic or corporate, joint stock company, or otherwise, or in the employment of any company, copartnership, individual or individuals . . . . one *per centum* on the amount of such excess of income."

Plumer received $1,500, as a yearly income" as minister to a Presbyterian Church, and the question was whether $1,100 of this was liable to taxation. The lower court held that it was, and was reversed. Notwithstanding the broad and comprehensive terms of the statute by which it took in "all" yearly incomes received for "any" office or "employment" in the service of "any" artificial body or "individual or individuals," yet the upper court, expressly applying the rule of construction stated above (page

647), to statutes imposing taxes and "penal" statutes (to which class revenue statutes belong), held that the statute of 1846 applied specifically to *"secular"* employments until it reached the person "in the employment of any . . . . individual or individuals," and that these words would have to be limited to "secular employments because "All the preceding words used, refer to such (secular) business only." This authority would seem to be conclusive that the "fifth clause of the statute in question here must be limited to income derived from *property or salaries,* since all the four preceding paragraphs are specifically so limited.

The text in 37 Cyc. 810b, citing many cases, clearly supports this contention. It is there said that no "incomes" can be taxed except by "express legislative authority," and this applies to "persons" and to "the receipts in respect to which the person is sought to be taxed," which it is said must "be plainly within the terms" of the statute. Lastly, it is submitted, that:

4. A CONTRARY CONSTRUCTION IMPOSES DOUBLE TAXATION.

If we interpret the "fifth" clause of this statute as a license to abandon the specifically enumerated sources of income set forth in the preceding clauses and generically embraced by the words property and salaries, and hold that the words "any source whatever" are limited by nothing (and certainly they are limited *only* by the preceding clauses), then double taxation is inevitable. Adopt this construction and every profession, occupation and business, even including ministers of the Gospel, and whether they pay a license tax or not, or receive "salaries" or reasonable compensation for work done measured by the time required to do it or otherwise, must pay this one *per cent* on incomes in excess of $2,000.

It is believed that a careful reading of the one hundred sections of the "Tax Bill" devoted to "Licenses" (page 2220, et seq.) will demonstrate that the above construction is an impossible one. It will there be seen that every profession, occupation and business which could be expected to yield "gains and profits" (other than those covered by the word "salaries" in the "income" section), are reached and taxed by a specific or graduated license tax. It will further be seen that this license schedule, whenever

the legislature deemed it proper to do so, is *graduated* by a standard which measures the license tax by the income which it is supposed will be received in the given case. Instances of the use of this standard are very numerous and some of them may be found in §§ 45, 46, 49, 55, 76, 78, 82, 91, 92, 95, 116, 118, 130. Different methods are adopted for graduating the tax in the various professions, occupations and businesses, as seemed to the legislature best adapted to each case, but it is manifest that the object in each case was to make the tax bear a just relation to the income of the person or business paying it. Where the tax is laid on a business, as in the case of merchants (§§ 45, 46), or contractors(§§ 90-91), the tax is fixed, sometimes by the amount of the capital at work in that business, while in other cases its size is determined by the size or population of the place in which it is conducted, as in the case of laundries (§ 130). When it comes to the learned professions, lawyers, physicians and architects, where there is little or no money capital and the income is measured by skill, experience, ability and reputation, we find the tax graduated by the number of years they have practiced their profession as well as the amount received therefrom (§§ 92, 116, 118).

Now if these licensees, in addition to their license tax, are to pay an income tax on their income in excess of $2,000, we have a bald case of double taxation whenever the business or profession yields "gains and profits" in excess of $2,000, and that, too, notwithstanding the fact that the license tax itself was *measured by the amount of the "gains and profits"* of the particular business or profession.

In Fulkerson *v.* Bristol, 95 Va. 1, 3, 27 S. E. 815, the question was whether bonds executed to a commissioner for the purchase price of property sold by decree of court were subject to taxation. The court held not, because the person to whom the debt, for which the property was sold, was due, was chargeable with taxes on that debt, and that to tax the purchase money bonds would be "a clear case of double taxation, and be unconstitutional and void." And Judge Riely further said:

"By the constitution of the state, all taxation, except as otherwise provided, is required to be equal and uniform; and an examination of the statutes enacted by the legislature with refer-

ence to taxation will disclose how careful it has been not to offend against this just limitation upon the right of taxation."

In 11 Ency. U. S. Sup. Ct. Rep., pages 385-6, it is said:

"Double taxation is never to be presumed. Justice requires that the burdens of government shall as far as practicable be laid equally on all, and, if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way, when the burden of both taxes falls on the same person."

The contention here made that it was not intended to make licensees also pay a tax on incomes derived solely from the licensed business or profession, as well as the truth of Judge Riely's statement that the legislature had always been "careful" to avoid all "double" taxation, is irresistibly established, it seems to the writer, by the correlative facts that none of the sources of income specifically enumerated in the first four clauses of this statute *are subjected to a license tax,* thereby clearly showing an intent to make the "income" tax embrace subjects not covered by the license tax, and the latter to cover subjects *not reached by the income tax.*

It is not believed that the correctness of this conclusion is successfully assailed by pointing out the case of the judge, who always receives a salary and must pay an "income" tax as well as a license tax, and the general counsel for large corporations and "company doctors" who generally receive "salaries" and must also pay both "income" and license taxes. Undoubtedly, in these isolated cases, there is double taxation, but it is because such cases fall within the *specific terms* of both the income and the license statutes, and no room is left for any construction, and besides such cases are isolated and exceptional, and are therefore not controlling. See, on this subject generally, 11 Va. Law Reg. 8.

For the foregoing reasons, it is believed that incomes, not derived from either property or salaries, but from a source upon which a license tax is assessed, are not assessable as "incomes" under Schedule D.

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